No. 83-2082

In the Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL ALAN CROOKER, PETITIONER

v.

UNITED STATES PAROLE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the copy of a presentence report that was prepared pursuant to Fed. R. Crim. P. 32 and transmitted by the probation officer to the Parole Commission for use in making parole determinations is an "agency record" of the Commission for purposes of the Freedom of Information Act, 5 U.S.C. 552.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulations and rule:

Statutes, regulations and rule—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 730 F.2d 1. The opinion of the district court (Pet. App. 22a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on March 21, 1984. The petition for a writ of certiorari was filed on June 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant provisions of the Freedom of Information Act, 5 U.S.C. 552, and the Parole Commission and Reorganization Act, 18 U.S.C. 4205(e), 4207, 4208 (b) and (c), are reproduced at Pet. App. 25a-27a.

STATEMENT

Petitioner brought this action against the Parole Commission under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking a copy of the presentence investigation report prepared at the time he was sentenced.

1. Petitioner was convicted in the United States District Court for the District of Massachusetts in 1977 on five counts of mailing threatening communications, in violation of 18 U.S.C. 876, and on one count of conspiracy to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to ten years' imprisonment. A presentence report was prepared by the probation office of that district court pursuant to Fed. R. Crim. P. 32(c). As provided by Fed. R. Crim. P. 32(c)(3)(A), petitioner was permitted to read the entire presentence report prior to sentencing, but he was not permitted to retain a copy of the report after sentence was imposed. See Fed. R. Crim. P. 32(c)(3)(E); Pet. App. 2a.

After sentencing, a copy of petitioner's presentence report was transmitted to the Parole Commission pursuant to the Parole Commission and Reorganization Act (Parole Act), 18 U.S.C. 4201 *et seq.* (Pet. App. 2a). The Parole Act provides that, in determining eligibility for parole, the Parole Commission shall consider, "if available and relevant," various reports and recommendations concerning the prisoner,

including "presentence investigation reports." See 18 U.S.C. 4207(3). To facilitate the Commission's consideration of these materials, the Parole Act provides that, "[u]pon request of the Commission, it shall be the duty of the various probation officers and government bureaus and agencies to furnish the Commission information available to such officer, bureau, or agency, concerning any eligible prisoner or parolee" (18 U.S.C. 4205(e)).

Prior to his parole hearing in 1980, petitioner again was permitted to read his presentence report. See 18 U.S.C. 4208(b)(2). However, the Commission, like the sentencing court, did not permit petitioner to retain a copy of the report. Pet. App. 2a. Instead, the Parole Commission's regulations governing release of documents provide that requests to obtain a copy of the presentence report must be directed to the "appropriate court." 28 C.F.R. 2.56(b).

2. In January 1983, petitioner filed an FOIA request with the Parole Commission seeking copies of numerous documents, including his presentence report. The Parole Commission released many of the documents, but withheld its copy of petitioner's presentence report.[1] Petitioner then filed this action against the Parole Commission under the FOIA in

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[1] The Commission also withheld certain medical records concerning petitioner that were obtained by the Parole Commission from a psychiatric institution (Pet. App. 2a). The district court concluded that the reports were exempt from disclosure under FOIA Exemption (b)(3), 5 U.S.C. 552(b)(3) (Pet. App. 24a). The court of appeals vacated this portion of the district court's judgment and remanded for the district court to determine whether some portions of the reports could be released to petitioner consistent with the relevant statutory provisions (Pet. App. 18a-20a). That aspect of petitioner's FOIA request is not at issue here.

the United States District Court for the District of Massachusetts seeking disclosure of the presentence report. The district court granted the Parole Commission's motion for summary judgment, holding that a presentence report is a "court document" not subject to the FOIA. Pet. App. 23a.

3. The court of appeals affirmed (Pet. App. 1a-20a).[2] It observed that the difficulty in resolving the question whether presentence reports are "agency records" subject to the FOIA derives from the fact that the reports have a "hybrid function": pursuant to Fed. R. Crim. P. 32(c), the reports are created and used by the court, which is expressly excluded from the coverage of the FOIA under 5 U.S.C. 551(1)(B); yet after sentencing, the probation officer must furnish a copy of the report to the Parole Commission, which is an agency subject to the FOIA (18 U.S.C. 4218(a)), for use by the Commission in performing its official functions (Pet. App. 4a). The court acknowledged that each of the two entities that uses the report "obviously exercises some 'control' " over it (*id.* at 7a). In these circumstances, the court reasoned, the pertinent inquiry was whether Congress gave the Parole Commission "sufficient control, rela-

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[2] The court of appeals disavowed any reliance upon a standing order of the United States District Court for the District of Massachusetts. The order stated, inter alia, that the copy of a presentence report that the court has made available to the Parole Commission or the Bureau of Prisons "constitutes a confidential court document and shall be presumed to remain under the continuing control of the court" and that disclosure by the Commission "is authorized only so far as necessary to comply with [18 U.S.C. 4208(b)(2)]" (Pet. App. 3a n.1). The court of appeals reasoned that such an expression of intent by the originating court would be valid only if it did not contravene the intent of Congress.

tive to control given the courts, over presentence reports" to outweigh the "traditional and statutorily authorized discretion" of the sentencing court under Fed. R. Crim. P. 32(c) to withhold distribution (*ibid.*).

The court of appeals concluded that the Parole Commission did not acquire sufficient dominion over the report to require that result. It relied upon a number of factors: the probation officer creates the presentence report at the direction of the sentencing court; the Parole Commission cannot compel the courts to create a presentence report; the sentencing court has greater discretion than does the Parole Commission to determine what information in the report should be disclosed, summarized, or withheld entirely; and the sentencing court is expressly authorized by Fed. R. Crim. P. 32(c) to permit the defendant to retain a copy of the report after sentencing, but 18 U.S.C. 4208(b) does not expressly authorize the Commission to permit the prisoner to retain a copy of the report.

The court of appeals also observed that a presentence report contains much sensitive information (Pet. App. 13a-14a) and that if disclosure of the presentence report could be compelled under the FOIA, the FOIA "would permit a quick end run around the court's discretion to refuse release of the report to the defendant after sentencing" (*id.* at 13a). The court acknowledged that a holding that presentence reports are "agency records" for purposes of the FOIA would not automatically result in compelled disclosure of them to third parties. However, the court expressed concern that the Commission's assertion of FOIA exemptions might not

adequately protect the reports or sensitive portions of them from public disclosure and that the result might be to inhibit the free flow of information to the probation officers who prepare the reports (Pet. App. 14a-17a). Against this background, the court held that "it is inappropriate to deem presentence reports to be agency records" (*id.* at 18a).

ARGUMENT

The court of appeals was clearly correct in holding that presentence reports are not subject to mandatory disclosure under the FOIA. Under Fed. R. Crim. P. 32(c), even the defendant himself cannot retain a copy of the report after sentencing unless the court, in its discretion, permits him to do so. It also is well settled that third parties cannot obtain a copy of the presentence report from the court absent a showing of particularized need. In view of this strict control over dissemination of the report by the originating court, Congress obviously did not contemplate that the copy of the report that is furnished to the Parole Commission would be subject to mandatory release to the public at large under the FOIA. The result in this case is no different because the requester happens to be the subject of the presentence report. Under the FOIA, the question is whether the document must be released to any member of the public, not to a person who may claim a special interest in its contents. Petitioner therefore has no special standing under the FOIA to obtain a copy of his presentence report.

The court of appeals in this case gave effect to the abiding public interest in the confidentiality of presentence reports by holding that the copy of the report that is furnished to the Parole Commission does

not become a record of the Commission and therefore is not an "agency record" subject to the FOIA. That is the position we urged in the court of appeals. However, in light of the 1983 amendments to Fed. R. Crim. P. 32(c), which were not addressed by the court of appeals, we have reassessed our position and determined, after full consultation with the Parole Commission and other interested parties, that the Commission will not in the future withhold copies of presentence reports on the ground that they are not "agency records" for purposes of the FOIA. But we continue to believe that presentence reports are clearly exempt from mandatory disclosure under the FOIA.

In these circumstances, the petition for a writ of certiorari should be denied. Although the District of Columbia and Ninth Circuits have held that copies of presentence reports that are furnished to the Parole Commission are "agency records" for purposes of the FOIA (see *Carson* v. *Department of Justice*, 631 F.2d 1008 (D.C. Cir. 1980); *Lykins* v. *Department of Justice*, 725 F.2d 1455 (D.C. Cir. 1984); *Berry* v. *Department of Justice*, 733 F.2d 1343 (9th Cir. 1984)), the conflict between those decisions and the decision below is of no continuing importance because presentence reports will not be withheld by the Parole Commission under the FOIA on the "agency records" ground in the future. In addition, no court of appeals has actually ordered the release of the Parole Commission's copy of a presentence report under the FOIA. There accordingly is no conflict among the circuits on the basic question whether a presentence report can be obtained from the Commission under the FOIA. Nor is the issue of the availability of presentence reports under the FOIA otherwise ripe for review by this Court, because the courts of ap-

peals have not yet fully considered the application of FOIA exemptions in this setting.

Review also is not warranted with regard to the circumstances of this particular case. Petitioner concedes (Pet. 2-3) that he read the entire contents of the specific report at issue in this case, both at the time of sentencing and again prior to his parole hearing, and that he took notes about the report on the latter occasion. In short, petitioner has no need to obtain an actual copy of his presentence report under the FOIA.

1. a. Under Fed. R. Crim. P. 32(c)(1), the probation service of the court must make a presentence investigation and report unless the defendant waives that requirement or the court determines that the record already contains sufficient information to permit the meaningful exercise of its sentencing discretion. If a presentence report is prepared, Fed. R. Crim. P. 32(c)(3)(A), as amended in 1983, requires the court to permit the defendant and his counsel to read it at a reasonable time before imposing sentence,[3] but not to the extent that it contains (i) diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation, (ii) sources of information obtained upon a promise of confidentiality, or (iii) any other information that, if disclosed, might result in harm to the defendant or other persons. In that event, the court must provide a summary of any factual material contained in the report upon which it intends to rely and must give the defendant and his counsel an opportunity to comment upon that material. Fed. R. Crim. P. 32(c)(3)(B).

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[3] Prior to 1983, Fed. R. Crim. P. 32(c)(3)(A) only required the court to permit either the defendant or his counsel to read the report upon request.

Under Fed. R. Crim. P. 32(c)(3)(E), any copies of the report made available to the defendant and his counsel "shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs." It also is well established that a third party cannot obtain a copy of the report from the court, at least in the absence of a showing of particularized need for disclosure in the interest of justice.[4] Compare *Illinois* v. *Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983), slip op. 8 n.14; *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 221-224 (1979). Thus, under Fed. R. Crim. P. 32 and established precedent, the sentencing court unquestionably has control over the presentence report itself, which retains its status as a court document while in the possession of the probation officer.

b. This case, however, concerns the status of the copy of the presentence report that is furnished by the probation officer to the Parole Commission for use in the performance of the Commission's official functions. There are substantial indicia of control by the Commission over that copy of the report and

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[4] See, *e.g.*, *Berry* v. *Department of Justice*, 733 F.2d at 1352; *United States* v. *Anderson*, 724 F.2d 596 (7th Cir. 1984); *United States* v. *Charmer Industries, Inc.*, 711 F.2d 1164, 1172-1176 (2d Cir. 1983); *United States* v. *Martinello*, 556 F.2d 1215, 1216 (5th Cir. 1977); *United States* v. *Cyphers*, 553 F.2d 1064, 1069 (7th Cir.), cert. denied, 434 U.S. 843 (1977); *United States* v. *Dingle*, 546 F.2d 1378, 1380-1381 (10th Cir. 1976); *United States* v. *Figurski*, 545 F.2d 389, 391 (4th Cir. 1976); *United States* v. *Evans*, 454 F.2d 813, 819-820 (8th Cir.), cert. denied, 406 U.S. 969 (1972); *Hancock Brothers, Inc.* v. *Jones*, 293 F. Supp. 1229, 1233 (N.D. Cal. 1968).

a corresponding absence of indicia of control by the court over the Commission's possession and use of it.

First, the probation officer may not decline to furnish a copy of the presentence report to the Parole Commission, and the court has no authority to prevent him from doing so. Congress has directed the probation officer to furnish the report upon request by the Commission in the same manner as it has directed all other government bureaus and agencies to furnish the Commission with information about the prisoner. 18 U.S.C. 4205(e). Moreover, the Parole Act does not direct the Commission to return the report to the court when the Commission has completed its use of the report or when the prisoner has completed serving his sentence, and we have been informed that the Commission does not ordinarily do so. Instead, the Commission's copy of the report is routinely sent to the Department of Justice's records center along with other documents in the prisoner's file.

Second, the Commission is required by statute to consider the presentence report in making its parole determination (18 U.S.C. 4207(3)), and we have been informed by the Commission that the presentence report frequently is the most important source of information about the prisoner. An adjudicatory body such as the Parole Commission ordinarily is presumed to have primary control over the record of proceedings before it, and the Parole Act does not grant the sentencing court authority to supervise the manner in which the Commission utilizes the presentence report in carrying out its official functions. Cf. *United States* v. *Addonizio*, 442 U.S. 178 (1979).

Third, under 18 U.S.C. 4208(b), the Commission is required, at least 30 days prior to the parole hearing, to give the prisoner "reasonable access" to the

presentence report and any other document to be relied upon by the Commission in making its determination. The Parole Act does not grant the sentencing court authority to determine whether and in what manner the prisoner will be afforded that right of access.[5]

c. In other circumstances, an agency's receipt, possession, and official use of a document in this manner would lead to the conclusion that the document in question is an "agency record." Compare *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 151, 157 (1980); *Forsham* v. *Harris*, 445 U.S. 169, 177 n.7, 183-184 (1980). But in the unique context of presentence reports, we cannot ignore the countervailing considerations. The definition of the term "agency" for purposes of the FOIA specifically excludes "the courts of the United States," just as it excludes "the Congress." 5 U.S.C. 551(1)(A) and (B), 552(e). It would undermine the respect for the separation of powers reflected in this exclusion—and the recognition it embodies of the

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[5] Under 18 U.S.C. 4208(c), the right of access does not apply to three categories of information that parallel those that may be withheld from the prisoner under Fed. R. Crim. P. 32(c)(3)(A) at the time of sentencing. As under Rule 32, if a document is deemed by the Commission, the Bureau of Prisons, or any other agency to fall within one of those categories, it is that entity's responsibility to prepare a summary of the material to be furnished to the prisoner. 18 U.S.C. 4208(c). The Parole Commission has informed us that where the sentencing court has summarized material in a presentence report in lieu of disclosing a portion of its contents to the defendant, it is the Parole Commission's uniform practice to furnish the prisoner with the summary prepared by the court rather than to prepare its own summary or to grant him access to the corresponding portion of the presentence report itself.

control each Branch must have over the documents it uses in carrying out its assigned functions—if documents generated by the courts and Congress that come into the possession of an agency subject to the FOIA were too readily deemed to be "agency records." See *Goland* v. *CIA*, 607 F.2d 339 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).

Moreover, as we have noted, Fed. R. Crim. P. 32 (c)(3)(E) specifically provides that any copies of presentence reports made available to the defendant and his counsel at the time of sentencing shall be returned to the probation officer immediately following the imposition of sentence "unless the court, in its discretion otherwise directs." There would be an obvious tension between the authority given the court under this provision to maintain the confidentiality of presentence reports and any holding that copies of the very same reports in the hands of the Parole Commission are subject to mandatory public disclosure under the FOIA. Accordingly, Fed. R. Crim. P. 32 and the policy of confidentiality it embodies properly may inform the determination of whether copies of presentence reports furnished to the Parole Commission are subject to mandatory disclosure under the FOIA. Indeed, the concern for maintaining the confidentiality of presentence reports appears to have tipped the balance for the court of appeals in this case on the "agency records" issue. See Pet. App. 15a-18a.

In our view, however, it is clear that the entire presentence report is exempt from disclosure under the FOIA even if it is regarded as an "agency record" and that the most sensitive portions of the report are further protected by a number of specific FOIA exemptions. See pages 18-21, *infra*. Furthermore, the text and background of the 1983 amendments to Fed.

R. Crim. P. 32, which apparently were not considered by the court of appeals, indicate that copies of presentence reports furnished to the Parole Commission as required by 18 U.S.C. 4205(e) should now be regarded as "agency records" of the Commission. Three features of the 1983 amendments are significant.

First, Fed. R. Crim. P. 32(a)(1) was amended in 1983 to require that the sentencing court determine that the defendant and his counsel have had an opportunity to read the presentence report. The Advisory Committee Note, in explaining the purpose of this requirement, states that the defendant's interest in an accurate report " 'does not cease with the imposition of sentence,' " because the report " 'plays a crucial role during parole determination,' " since 18 U.S.C. 4207 requires the Commission to consider the report and it " 'serves as the primary source of information in calculating the inmate's parole guideline score.' " 97 F.R.D. 245, 306 (1983), quoting Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1613, 1651 (1980).[6] The Advisory Committee Note then concludes that the defendant should be aware at the time of sentencing of these potential uses of the report, although it states that the Advisory Committee rejected a proposal to require the sentencing judge to so inform the defendant. It instead recommended that a form explaining these further uses be attached to the report and be signed by

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[6] The same passage also notes the importance of the report to the Bureau of Prisons in determining the prisoner's classification within the facility, his ability to obtain furloughs, and the choice of treatment programs.

the defendant. 97 F.R.D. at 306. The background of this amendment to Rule 32(a)(1) thus conforms to the policy of the Parole Act, which contemplates that presentence reports will play a crucial role in parole determinations and in effect deems the presentence report to be prepared for the eventual use of the Parole Commission as well as the more immediate use of the sentencing court.

In addition, the 1983 amendments added a new paragraph (D) to Rule 32(c)(3) to provide that if, at the time of sentencing, the defendant or his counsel alleges any inaccuracy in the presentence report, the court must either make a finding with respect to the disputed matter or determine that no such finding is necessary because the matter will not be taken into account at sentencing. Paragraph (D) then concludes: "A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission." The Advisory Committee Note on this amendment explains that "the Bureau of Prisons and the Parole Commission make substantial use of the presentence investigation report" and that the new requirement is intended to ensure that a record is made of the resolution of contested matters so that the Bureau and Commission can accurately assess its contents. 97 F.R.D. at 308. In this respect, then, Congress actually directed the sentencing court to facilitate the consideration of the report by the Bureau of Prisons and Parole Commission.

Finally, and with particular relevance to the "agency records" issue, the Advisory Committee Note on the amendments to Rule 32 concludes (97 F.R.D. at 309):

> The issue of access to the presentence report at the institution was discussed by the Advisory Committee, but no action was taken on that matter because it was believed to be beyond the scope of the rule-making power. Rule 32 in its present form does not speak to this issue, and thus the Bureau of Prisons and the Parole Commission are free to make provision for disclosure to inmates and their counsel.

This disclaimer of authority under Rule 32 for a court to control the Commission's use of the presentence report or its disclosure to the prisoner would appear to remove the basis for reading Rule 32 to require that copies of presentence reports furnished to the Parole Commission be regarded as court documents rather than "agency records." In the absence of any such special restraints imposed by Rule 32, we believe that the other indicia of control by the Parole Commission over its copy of a presentence report (see pages 9-11, *supra*) must lead to the conclusion that that copy is an "agency record" of the Commission.

Against this background of the 1983 amendments to Rule 32, the Parole Commission will not in the future withhold copies of presentence reports under the FOIA on the ground that they are not "agency records" for purposes of that Act.

d. One further point warrants brief discussion. In holding that the Commission's copy of a presentence report is not an "agency record," the court of appeals relied upon what it believed to be the sentencing court's superior prerogatives with regard to the report. This perception was based on the court of appeals' view that the sentencing court has discretion under what is now Fed. R. Crim. P. 32(c)(3)(E) to permit the prisoner to retain a copy of the presen-

tence report, but, the court believed, the Commission does not have that authority under the Parole Act. See Pet. App. 10a, 13a. Contrary to the court of appeals' view, however, the Parole Act does not bar the Commission from giving the prisoner a copy of his presentence report.

The Parole Act provides that the prisoner must be granted "reasonable access" to documents to be used by the Commission in making its parole determination. 18 U.S.C. 4208(b). The Commission has discretion under this provision either to allow the prisoner to read the documents in question or to furnish him with copies of them. See 28 C.F.R. 2.55(a)(3) and 2.56(a).[7] The Commission has elected to allow

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[7] The express authorization in Fed. R. Crim. P. 32(c)(3)(E) for a court to permit the defendant to retain a copy of the presentence report does not suggest that the absence of such an express authorization in 18 U.S.C. 4208(b) bars the Commission from doing so. The reference in Rule 32(c)(3)(E) to the court's discretion to permit the defendant or his counsel to retain a copy of the report is an exception to the generally applicable requirement in the Rule that any copies of the report be returned to the probation officer after sentencing. As originally proposed by this Court in 1974, Rule 32(c)(3)(D) did not contain that exception, but instead provided that copies of the report "shall not be made" by the defendant, his counsel, or the attorney for the government. H.R. Doc. 93-292, 93d Cong., 2d Sess. 20-21, 71 (1974). Congress amended Rule 32(c)(3)(D) to grant the court discretion in this regard, because "[t]here may be situations when it would be appropriate for either or both of the parties to retain the presentence report." H.R. Rep. 94-247, 94th Cong., 1st Sess. 18 (1975). There is no reason to believe that Congress had changed its mind when it enacted the Parole Act a year later.

Nor is there any reason to believe that Congress would have wanted to withhold the necessary discretion from the Commission. To the contrary, under 18 U.S.C. 4208(b), there is no express requirement that the prisoner return copies of any

the prisoner only to read but not to retain a copy of his presentence report, and has required the prisoner instead to request his own copy of the presentence report from the court that sentenced him. 28 C.F.R. 2.56(b). The effect of the Commission's practice is to defer to the determination made by the court at the time of sentencing with regard to whether the prisoner may have a copy of his presentence report.

Although this is an entirely reasonable way for the Commission to accommodate the statutory requirement that the prisoner have "reasonable access" to his presentence report with the need to maintain the confidentiality of the report, the Parole Act itself does not prohibit the Commission from furnishing the prisoner with a copy of the report.[8] And indeed it is

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documents (including the presentence report) to the Commission after being afforded "reasonable access" to them. There accordingly was no need for Congress to fashion an exception to any such requirement in order to grant the Commission authority to permit the prisoner to retain such copies. The decision whether to do so therefore is committed to the Commission's discretion in implementing the "reasonable access" requirement in 18 U.S.C. 4208(b).

[8] It is true that the Parole Commission explained when it adopted 28 C.F.R. 2.56(b) that the presentence report "is viewed by the Commission as a court document that cannot be disclosed without the express permission of the court." 44 Fed. Reg. 26551 (1979). However, the Commission did not state in this passage that the *Parole Act* barred the Commission from giving the prisoner a copy of the report, as the court of appeals in this case seemed to hold. The Commission relied instead on what it perceived to be the special status of the report itself, presumably by virtue of its creation pursuant to Fed. R. Crim. P. 32 under the auspices of the court. As we have explained, however, the 1983 amendments to Rule 32 now lead us to a different conclusion.

possible that the Commission in the future would alter its practice and furnish the prisoner with a copy of the presentence report where such access would further sound correctional policies. The essential point for present purposes, however, is that the decision whether to furnish a copy of the report is a matter committed to the Commission's informed judgment, just as the sentencing court itself has discretion under Rule 32 to permit the defendant to retain a copy of the report. The FOIA does not furnish a prisoner or any third party with a right to *insist* upon obtaining a copy of the report, as we shall now explain.

2. Although we have concluded that copies of presentence reports furnished to the Parole Commission should now be regarded as "agency records" for purposes of the FOIA, the court of appeals was correct in holding that they are not subject to mandatory disclosure under that Act. As we have noted above, it is firmly established that a third party may not obtain a copy of a presentence report directly from the sentencing court, at least in the absence of a showing of particularized need for disclosure in the interest of justice. See page 9 & note 4, *supra*. When Congress enacted the Parole Act and required the probation officer to furnish a copy of the presentence report to the Parole Commission, it obviously did not intend that the report thereafter would be routinely made available to the public at large under the FOIA. Because the presentence report is privileged from discovery by third parties while in the possession of the Parole Commission, the Commission's copy of the report is exempt from mandatory disclosure under FOIA Exemption 5, 5 U.S.C. 552(b)(5), which applies to "inter-agency or intra-agency memorandums

or letters which would not be available by law to a party other than an agency in litigation with the agency."

It is of no significance for purposes of Exemption 5 that the well-established bar to disclosure of presentence reports to third parties may be overcome by a showing of particularized need for the report in connection with other proceedings. "The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 7; see also *United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 6-7. For the same reason, it does not matter that the prisoner himself is permitted by Fed. R. Crim. P. 32(c) and 18 U.S.C. 4208(b) to read the report (or summaries of its sensitive portions) prior to sentencing and again prior to his parole hearing. Disclosure to the subject of the report on those occasions is premised upon a determination that he has a special need to review it in connection with the very proceedings for which it was prepared. The pertinent question under the FOIA, however, is whether the document must be released to any member of the public at large, not simply to a person who has a special interest in the document. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 & n.16 (1975). In this case it is clear that Congress did not intend that result.

The fact that Congress did not intend to permit public access to presentence reports is manifest from its enactment of a special statutory procedure in 18 U.S.C. 4208(b) whereby a prisoner may have "reasonable access" to his presentence report and other documents upon which the Commission relies, just as Fed. R. Crim. P. 32(c) requires that the defendant

be afforded an opportunity to read the report prior to sentencing. This special statutory access procedure for a particular category of individuals necessarily precludes a right of access to those same materials by others, including the public at large under the FOIA. See *Zale Corp.* v. *IRS*, 481 F.Supp. 486 (D.D.C. 1979); *White* v. *IRS*, 707 F.2d 897, 900 (6th Cir. 1983); *King* v. *IRS*, 688 F.2d 488, 495-496 (7th Cir. 1982).[9] Cf. *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 6; *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

Especially sensitive portions of the report would be protected by other FOIA exemptions as well. Under 18 U.S.C. 4208(c), the Commission is specifically authorized to withhold even from the prisoner those portions of the presentence report that contain (i) diagnostic reports the disclosure of which would disrupt an institutional program, (ii) confidential sources of information, or (iii) other information that might result in harm to any person. Material falling within these provisions plainly qualifies for withholding under FOIA Exemption 3, 5 U.S.C. 552(b)(3), which applies to matters that are "specifically exempted from disclosure by [a] statute" that "refers to particular types of matters to be withheld." See Pet. App. 14a-15a; *Berry* v. *Department of Justice*, 733 F.2d at 1353-1354.[10]

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[9] But see *Linsteadt* v. *IRS*, 729 F.2d 998, 1001-1003 (5th Cir. 1984); *Currie* v. *IRS*, 704 F.2d 523 (11th Cir. 1983).

[10] Indeed, against the background of Rule 32(c), the established privilege for presentence reports, and the special provision in 18 U.S.C. 4208(b) for only limited access to the report, 18 U.S.C. 4208 might well constitute an Exemption 3 statute with regard to the entire presentence report.

As the court of appeals recognized (Pet. App. 15a-16a), still other FOIA exemptions would also be available to prohibit mandatory public disclosure. Exemption 4, 5 U.S.C. 552(b)(4), would allow the withholding of commercial or financial information pertaining to the defendant or others. Exemption 6, 5 U.S.C. 552(b)(6), would allow the withholding of any information in the report if its disclosure would result in a clearly unwarranted invasion of personal privacy. And Exemption 7, 5 U.S.C. 552(b)(7), applicable to law enforcement information, would reinforce the Commission's authority under Exemptions 3 and 6 to withhold any information that might disclose confidential sources or result in an unwarranted invasion of privacy.

3. We fully understand and share the view of the sentencing courts and probation officers that the long-standing confidentiality of presentence reports must be maintained and that the reports therefore must be withheld from the public. Our submission in this case should in no way be viewed as a retreat from that position. For the reasons stated above, however, we perceive no realistic prospect that presentence reports —and especially their sensitive portions—would be subject to mandatory release to the public at large under the FOIA if the copies of presentence reports that are furnished to the Parole Commission are regarded as "agency records" within the meaning of the FOIA. Nor does the Commission have any intention of permitting such disclosures. The Commission, like the courts, has a compelling interest in the completeness and accuracy of presentence reports, and the Commission intends to continue to cooperate with the courts to maintain their integrity and confidentiality and to deny public access to them. The Commission also will consult fully with the courts

if in the future it should consider whether prisoners should be permitted to obtain copies of their presentence reports (or portions thereof) in appropriate circumstances where such access would further sound correctional policies without raising countervailing concerns.

4. There remains the matter of the proper disposition of this case. The question whether the court of appeals correctly determined that the Parole Commission's copies of presentence reports are not "agency records" is of no continuing importance, because the Parole Commission will not rely on that basis of withholding in the future.[11] Moreover, the broader question of the availability of presentence reports under the FOIA generally does not warrant review at this time. No court of appeals has held that presentence reports must be disclosed pursuant to the FOIA. The precise ground on which the Commission may withhold its copies of the reports—whether because they are not "agency records" subject to the FOIA, as the court of appeals in this case held, or because of the application of FOIA exemptions or Congress's specific provision in 18 U.S.C. 4208(b) for only limited access to them—is of little more than academic interest at this point. Finally, contrary to petition-

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[11] This "agency records" question in this case also is pending in *Cotner* v. *Department of Justice*, No. 83-1757, which was argued before the Fifth Circuit on September 27, 1984. The attorney for the government informed the panel in *Cotner* that the Solicitor General has reassessed the matter in connection with the response to the certiorari petition in the instant case and the 1983 amendments to Rule 32 and that we would send a copy of this brief to the court of appeals when it is filed. We accordingly have sent a copy of this brief to the *Cotner* panel. The question is also before the Eleventh Circuit in *Scott* v. *Parole Commission*, No. 83-8805, which has not yet been set for oral argument.

er's contention (Pet. 5), the court of appeals' disposition of the "agency records" issue does not have broad implications with regard to other types of documents. The court rested its holding in large measure on the peculiar features of presentence reports and the provisions of Fed. R. Crim. P. 32. For these reasons, there is no question of general importance warranting review in this case.

Nor are further proceedings necessary with regard to the particular FOIA request at issue here. Petitioner already has read the entire contents of his presentence report prior to sentencing and again prior to his parole hearing (see Pet. 2-3), pursuant to the provisions of Fed. R. Crim. P. 32(c)(3)(A) and 18 U.S.C. 4208(b) that were specifically intended to govern access to the report by someone in petitioner's position. In these circumstances, the court should not grant review to decide a legal issue that is unlikely to arise again, that will have little if any ultimate bearing on the disclosability of presentence reports under the FOIA, and that is of virtually no practical importance to petitioner.[12]

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[12] It is also significant that in all of the FOIA cases decided by the courts of appeals involving a request for a copy of a presentence report from the Parole Commission, the requester has been the prisoner himself. Pet. App. 2a; *Berry* v. *Department of Justice, supra*; *Lykins* v. *Department of Justice, supra*; *Carson* v. *Department of Justice, supra*; *Cook* v. *Willingham*, 400 F.2d 885 (10th Cir. 1968). Accord, *Lindsey* v. *Bureau of Prisons*, 736 F.2d 1462 (11th Cir. 1984), petition for cert. pending, No. 84-5412 (prisoner's suit to obtain a presentence report from the Bureau of Prisons). Because a prisoner has two opportunities to read his report, a prisoner's suit under the FOIA seeks only whatever incremental advantage there might be in obtaining an actual copy of the report.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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